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No. 104

In the Supreme Court of the United States

OCTOBER TERM, 1932

BANKERS POCOHONTAS COAL COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

MEMORANDUM ON BEHALF OF THE COMMISSIONER IN OPPOSITION TO MOTIONS FOR REVIEW OF APPLICATION OF MANDATE AND RECALL OR MODIFICATION OF JUDGMENT AND MANDATE

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The respondent opposes the petitioner's motion filed herein on May 22, 1933, for the following reasons:

1. In its opinion herein, rendered December 5, 1932, the Court referred to the petitioner's contention that it was entitled to a different depletion allowance from that awarded by the Board of Tax Appeals because of the decision in *Murphy Oil Co.* v. *Burnet,* 55 F. (2d) 17 (C.C.A., 9th), affirmed, 287 U.S. 299,[1] and held, we believe, that the question was not properly presented by the record.

[1] The opinions of this Court in the instant case and in *Murphy Oil Co.* v. *Burnet*, *supra*, were rendered on the same date (December 5, 1932) and both were by Mr. Justice Stone.

Evidence upon this subject had been presented to the Board, for the first time, on an application for rehearing, but the Board had declined to consider it. This Court said:

> The purpose of the tendered evidence was to bring the case within the ruling of the Court of Appeals for the Ninth Circuit affirmed in No. 80, *Murphy Oil Company* v. *Burnet, supra,* that bonus payments to the lessor of a mineral lease are to be treated as advance payments of royalties and depletion allowed. This was a new issue. * * * It is not shown that the evidence tendered was not available to the petitioner in ample time to present it before the Board had made and filed its findings of fact and opinion. Under the circumstances, we cannot say that the Board abused its discretion in denying a rehearing.

2. The question of the applicability to this case of the decision of this Court in *Murphy Oil Co.* v. *Burnet, supra,* was presented to the Court in a petition for rehearing filed by the petitioner December 30, 1932, and denied January 9, 1933.

3. The present contention as to the application of what the petitioner conceives to be the rule approved by this Court in the *Murphy Oil Co. case* should not be considered, because it was not presented by assignments of error in the petition for certiorari herein, and apparently it was not presented to the Board or the Circuit Court of Appeals. In its petition for certiorari (p. 9) peti-

tioner specified as error the decision of the Board and the Circuit Court of Appeals:

> 4. In deciding that the excess amount of minimum payment received in any year from the grantee over the payment thereby made for coal actually mined within the year is not subject to any depletion allowance.

It appears from the statement of the proposed modification in the judgment and mandate of this Court (present motion, p. 9) that petitioner now seeks to have the excess of minimum annual payments over payments for coal mined in the various years treated as capital and not income, instead of having such excess subject to depletion allowance, which was the basis of its assignment of error quoted above. Aside from other objections to the motion, it seems to us that it would be improper to modify the judgment and mandate as requested and thereby to decide a question which was not properly presented to the Court when the case was here on the merits.

If the record properly presented the question which the petitioner now seeks to raise, and if it were presented *de novo* on the merits, we believe it could be demonstrated that the adjustment which the petitioner claims is not authorized by the decision of this Court in *Murphy Oil Co.* v. *Burnet, supra.* It would, however, unduly extended this memorandum to discuss the details of the adjustment and the application of the rule in the *Murphy*

Oil case thereto. In the absence of any indication that the form of the judgment or mandate was due to mistake or oversight, a new consideration of the merits in this respect seems quite out of place upon an application of this kind, and we believe that the Court should not be burdened with it at this stage of the proceedings.

The motion should be denied.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

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